



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 405 OF 1999

CHINA ROAD & BRIDGE CORPORATION.....PLAINTIFF

VERSUS

STALLION INSURANCE COMPANY LTD.....DEFENDANT

RULING

This matter was listed before me as a mention on 7th June 2004, and both Counsel for the Plaintiff and the Defendant were present. Mr. Miller Counsel for the Plaintiff told the Court that the matter had been listed erroneously as it should have been marked withdrawn in accordance with their Notice of Withdrawal and Discontinuance of Suit under Order XXIV, dated 27th April 2004, and filed in court on 28th April 2004, and duly served upon the Defendant's Advocates Billings & Co.

The Defendant's Counsel did not share the view that mere filing of the Notice of Withdrawal and Discontinuance was adequate to withdraw and discontinue the suit. It has to be sanctioned by the Court. He said so in his letter of 2nd June 2004 complaining to the Deputy Registrar of the Non-Availability of the Court file, and that the withdrawal and discontinuance must be sanctioned by the Court. So he took up this theme on 7th June 2004. He gave a history of the case and that it had been fixed for hearing for two days commencing 7th and 8th June 2004. He was therefore surprised to be served with the Notice of Withdrawal and Discontinuance of suit. Counsel submitted that the suit having been fixed for hearing, it can only be withdrawn and discontinued upon terms. He had no objection to the withdrawal of suit subject to payment of costs.

For the record, he submitted, the Defendant was wound up by Order of the Court dated 15th November 2001, and that since then the Plaintiff had caused the Defendant to incur extra costs through seeking leave of the Court to defend the Defendant then under receivership. These are adequate grounds to entitle the Defendant to costs. The claim of upwards of Shs. 76 million is substantial and costs has been and are important consideration. Having been given authority and being a recognized agent of the Receiver and Manager, the Defendant's Advocate is entitled to costs, and he urged the Court to grant the costs to the Defendant's Counsel as a term for withdrawal of the suit.

In response to this unexpected attack Miller Counsel for the Plaintiff expressed surprise at the call for costs. Costs do not arise under Order XXIV rule 1 pursuant to which the notice for withdrawal and discontinuance of the suit was filed. The Plaintiff had not come to Court under Order XXIV rule 2(2) which in the circumstances is inapplicable. An application dated 16th December 2003 seeking leave to commence proceedings against the Defendant could not proceed on 30th January 2004 because the Defendant had been placed under statutory management and subsequently wound up.

The Plaintiff was therefore obliged to file the Notice of Withdrawal and Discontinuance of suit on 28th April 2004, and the issue of costs under Order XXIV rule 2(2) does not arise. The Plaintiff had not sought discontinuance of the suit.

The Plaintiff had merely complied with the requirements of Order XXIV rule 1. The withdrawal of suit had been brought about by the fact of the Defendant's being wound up. The Plaintiff was not withdrawing the suit for its own reasons, it was withdrawing it because of the non-existence of the Defendant. To award costs against the Plaintiff for withdrawal of suit against the Defendant would not only be very punitive against the Plaintiff, but would be inequitable. The claim was for shs. 76 million and the costs would be colossal. The notice of withdrawal and discontinuance having been filed he urged the court to mark the case as withdrawn.

Having summed up the position of the parties, I shall now consider the provisions of Order XXIV, rule (1) and rule 2(2) which are the provisions in contention by the two Counsel. The rules are as follows:-

1. "At any time before the setting down of the suit for hearing the Plaintiff may by notice in writing wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.

And rule 2(1) and (2) provide as follows:-

2 (1) where a suit has been set down for hearing it may be discontinued, or any part of the claim withdrawn, upon the filing of a written consent signed by the parties.

(2) where a suit has been set down for hearing the Court may grant the Plaintiff leave to discontinue his suit, or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just,"

Under rule 1 above, the Plaintiff may do one of two things with his suit. He may discontinue the whole of his suit, or withdraw part of his claim. If he does so, (subject to the law on limitation of actions) he may institute another suit on the same facts, and the fact that he discontinued a previous suit or withdrew part of the claim will not afford a defence to any other party or the defendants. To enjoy that right, he must discontinue his suit or withdraw part of his claim before setting down the suit for hearing.

Once the suit is set down for hearing the Plaintiff puts himself out of the ambit of rule 1 aforesaid. He may only withdraw or discontinue the suit either with written consent of the other party, (rule 2(1)), or seek leave of the Court to discontinue his suit or withdraw any part of his claim rule 2(2), **and that the Court may grant leave to the Plaintiff to withdraw his suit on terms as to costs, the filing of any other suit, and otherwise as are just.**

Counsel for the Plaintiff was emphatic the notice of Withdrawal and Discontinuance of Suit was signified under rule 1 of Order XXIV of the Civil Procedure Rules. In this assertion, he was clearly not correct. Having set down the suit for hearing for 7th & 8th June 2004, the Plaintiff had shut himself away from that rule. He could only have sought consent of the Defendant to discontinue and withdraw the whole suit, and by filing such consent in Court. He did not do so.

Clearly neither the Plaintiff nor the Defendant has the stomach to continue with this suit. The Defendant has been or is in the final stage of being wound up. The Plaintiff has little prospects of getting a cent from the process. I did not hear Counsel for the Defendant really oppose the notification for discontinuance and withdrawal of the suit. In terms of rule 2(2) above, the notification ought to have been in a form of an application; and a prayer to discontinue the whole suit against what Counsel for the Plaintiff called a "dead" defendant.

There is however no formal application before Court for discontinuance of the suit against the Defendant. There is a Notice of Withdrawal and Discontinuance of suit under Order XXIV.

This notice sounds more in terms of rule 2(2) of the said order than rule 1 thereof. It certainly does not

sound in rule 2(1) as it is not signed by the Defendant's Counsel. In exercise of the Court's power as enshrined in Section 3A of the Civil Procedure Act, and to meet the ends of justice, I shall regard the said Notice as it has been drawn filed and served upon the Defendant's Counsel, as an application for discontinuance and withdrawal of the whole suit. I grant that leave and there shall be an order accordingly.

Rule 2(2) gives the Court discretion to grant such leave as I have just granted upon terms, firstly as to costs. Secondly, the filing of any other suit, and otherwise as are just. I did not hear Counsel for the Plaintiff suggest that the Plaintiff may at same stage in the future bring the same or similar suit against the Defendant. It is most unlikely as Counsel has already described the Defendant as a "dead" defendant. In any event if ever the defendant were to be "resurrected" under some other banner in the future, the Plaintiff may well have got caught under some provisions of the law relating to limitation of actions. There is therefore no fear on this score on the part of the Defendant's Counsel, and no orders need to be made on this point. This leaves the question of costs.

The provision of rule 2(2) as to costs is permissive, and costs are therefore at the discretion of the court. The rule further says the terms of withdrawal or discontinuance shall be such as to costs, or otherwise, as are just. The Plaintiff's claim herein according to the plaint filed on 13.4.1999 is expressed in different currencies, Kshs. 9,094,369.65, and Japanese Yen (JPY 91,006,968.00) and JPY 45,000,000 all said to be worth or aggregate to Ksh. 76-78 million depending upon the ruling exchange rate on the date of conversion. Suffice it to say it is not a small sum by any count. Both Counsel described it as a colossal sum, deserving colossal fees. The Plaintiff has discontinued and abandoned this claim, not because it has no evidence to substantiate its claim but because the object or target of the claim no longer exists, and if it does, there is no chance it will satisfy a decree in the matter. The prudent step to take is to discontinue the action and cut down the costs.

This court would be adding further loss and misery to the Plaintiff if it was ordered to pay the costs of the Defendant or the Defendant's Counsel. The just and proper order to make in these circumstances is that each party shall bear its own costs. It is so ordered.

Dated and delivered at Nairobi this 12th day of July 2004.

In the presence of Counsel

..... **for the Plaintiff**

..... **for the Defendant**

ANYARA EMUKULE

JUDGE